IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6585 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GUJARAT STATE FERTILIZERS AND CHEMICAL LTD.

Versus

COMMISSIONER OF INCOME TAX-1

Appearance:

1. Special Civil Application No. 6585 of 2004
MR J.P.SHAH WITH MR MANISH J SHAH for Petitioner
M/S.VYAS ASSOCIATES for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 01/02/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. Rule. Mr.D.D.Vyas, the learned Standing Counsel for the respondent - revenue waives service. With consent of both the learned counsel, the matter is taken up for final disposal.

2. The petitioner Company produces various types of fertilizers and one of them is urea. The Ministry of Fertilizers, Union of India, has evolved a Scheme of Subsidy through its "Fertilizer Industry Coordination Committee" (FICC). The urea produced by the petitioner is required to be sold to farmers at a specified price and under the Scheme, FICC computes the retention price; the difference between the controlled sale price and the retention price so fixed is paid to the manufacturing unit as subsidy every month. It appears that the petitioner has been showing such subsidy as its income from year to year. That despite there being requirement of revision of retention price every three years, in actual practice, such revision does not take place at such fixed periodical intervals. It is the case of the petitioner that, sometime in 2000 - 2001, FICC discovered an error in computation of retention price right from 1982 and therefore, decided to recover the excess subsidy, which according to FICC was paid to the petitioner. It is the case of the petitioner that a sum of Rs.229.91 crores was recovered from the petitioner and a further sum of Rs.146 crores was recovered. The petition sets out in tabular form the details of recovery, but for the present, it is not necessary to reproduce the figures applicable to each of the years under consideration. According to the petitioner, for the period, financial years 1982 to 2001 - 2002, the petitioner was called upon to refund subsidy to the extent of Rs.375.99 crores and hence, the petitioner moved Central Board of Direct Taxes requesting for directions to respondent No.1 : (1) to condone the delay in preferring application under Section 264 of the Income-tax Act, 1961 (the Act); and (2) revise the assessments of the aforesaid years by granting necessary relief by reducing the income proportionately to the extent of withdrawal of subsidy year-wise.

3. It appears that correspondences ensued between the parties, but ultimately, on 5th November 2003, the Secretary to the Government of India wrote to the Chief Commissioner of Income-tax stating that the application moved by the petitioner under Section 264 of the Act be disposed of after giving adequate opportunity of hearing

to the petitioner. The respondent No.1 heard the petitioner through its representative and ultimately vide impugned order dated 10th March 2004 (Exh. "F"), rejected the revision application on two fold counts: firstly, by refusing to condone the delay, and secondly, also on merits of the matter. It is this order which is under challenge in the present petition. The petitioner has prayed for the following reliefs :

[A] this Hon'ble Court be pleased to call for the records of the proceedings, look into them and be pleased to issue a writ of certiorari or any other appropriate writ, order or direction, quashing the order of the Commissioner of Income-tax at Exhibit E.

[B] this Hon'ble Court be pleased to hold that the petitioner is entitled to the deduction in the year in which it was paid more and which more was later repaid to the Government of India, and be pleased to ask the Assessing Officer to pass an order downward revising the assessed income of the assessee all those assessment years 1983-84 to 1998-99 and to grant the refund of the related tax and interest.

[C] that pending the hearing and final disposal of this application, this Hon'ble Court be pleased to ask the Respondent No.2 to pass a provisional order revising the assessment orders of the Assessment Years 1983-84 to 1998-99 downward revising the assessed income by the subsidy later withdrawn.

[D] this Hon'ble Court be pleased to award cost of this petition to the petitioner."

4. Heard Mr.J.P.Shah, the learned Advocate for the petitioner and Mr.D.D.Vyas, the learned Standing Counsel for the respondent - revenue.

5. The case of the petitioner, in support of its plea for condonation of delay, is that the recovery of subsidy has been initiated and effected by various orders commencing from 2nd December 1998 and spreading over a period of three years. So far as the aspect of condonation of delay is concerned, it is apparent that the petitioner cannot be non-suited on that ground taking

into consideration the fact that whether the petitioner was required to actually refund the amount of excess subsidy by virtue of downward revision of retention price was not finalized, and it was only by virtue of letter dated 5th December 2001 that the petitioner was informed by FICC to prefer claims on the basis of revised retention price in the prescribed proforma. The petitioner was also advised to duly adjust the reduction in subsidy on account of the downward revision of retention price in the arrears of bills or fresh bills that may be preferred with the FICC and only in case where no payments are due from the government, the petitioner was required to refund the amount to the government by due date.

6. In such circumstances, the approach of the Commissioner of Income-tax in refusing to condone the delay on the ground that there was no valid explanation for the delay, is not in order. The position in law is well settled that an assessee should be granted appropriate relief where it is due without standing on technicalities and the revenue must bear the established legal position in mind while dealing with applications seeking condonation of delay. It is necessary that a liberal approach is adopted in such matters so as to ensure that substantive rights are not defeated on the basis of technicalities or limitation. Accordingly, the impugned order, to the extent it refuses to condone the delay, is quashed and set aside.

7. In so far as the merits of the controversy are concerned, it was submitted by Mr.Shah that the petitioner was on the aforestated facts assessed on excess income for the years under consideration and once the petitioner had been able to show that it was not entitled to subsidy in light of the subsequent orders of FICC, the assessments wherein the said portion of subsidy was treated as income and had been taxed was required to be revised by granting appropriate relief to the petitioner in each of the years under consideration. In the alternative, it was submitted that the revenue should not be permitted to deny legitimate claim of the petitioner by refusing deduction of the amount which the petitioner would be called upon to pay in subsequent years, namely subsequent to the order dated 5th December 2001, whereby the petitioner is required to adjust the amount or make payment where no recovery is to be made of outstanding bills, and at the said point of time in the relevant accounting year, when such adjustment / payment takes place, the petitioner must be granted appropriate deduction from its taxable income.

8. Mr.D.D.Vyas, the learned Standing Counsel for the revenue, while resisting the claim of the petitioner in relation to revision of completed assessments for the purposes of granting relief from the income already assessed, made a statement, under instructions, that the revenue shall not raise any objection and shall grant deduction to the petitioner as and when the petitioner is called upon to make the payment and / or makes payment of excess amount of subsidy in subsequent years.

9. It is apparent from the communication dated 5th December 2001 that, while communicating the revised retention price of urea produced by the petitioner, FICC has stated the modality and the procedure to be adopted for the purposes of making claims and / or payments, as the case may be, in case of the petitioner for different periods inclusive of future bills to be preferred by the petitioner, in the following words :

> "You may prefer your claims on the basis of the revised retention price in the proforma prescribed by the FICC. Reduction in subsidy on account of downward revision of retention prices may be duly adjusted in the arrears bills or fresh bills to be preferred with the FICC and in case no payments are due from the Government, the amount be refunded to the Government by due date."

10. In light of the aforesaid communication, the petitioner would be entitled to make claim of the amount which it is called upon to refund as and when it actually makes the payment and considering the statement made on behalf of the respondents, the petitioner shall be entitled to claim deduction qua such payment from its taxable income in the year in which such payment is actually made.

11. Accordingly, the respondent No.1 is directed to modify the later portion of his impugned order whereunder he has rejected the claim of the petitioner Company on both the counts, despite holding that "At best, the assessee Company can claim deduction for the amount actually refunded in any later year, because the liability to refund arises in those years". The order made by the Commissioner of Income-tax, respondent No.1 dated 10th March 2004 under Section 264(1) of the Act (Exh."F") is, therefore, quashed and set aside, with the aforesaid direction. The modified order as aforesaid shall be made by respondent No.1 within a period of four

weeks from today.

12. The petition is, accordingly, allowed to the aforesaid extent. Rule is made absolute accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[H.N.DEVANI, J.]

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